WAIVER OR ELECTION

REFERRING to a recent South Carolina case [1] in which a defending insurance company pleaded forfeiture of the policy by breach of a condition, and the plaintiff replied that the condition had been waived, the HARVARD LAW REVIEW commentator on "Recent Cases" wrote as follows:

"The principal case can only be supported on the theory that the insurer has merely an election to avoid the policy, which can only be taken advantage of by promptly displaying an intent to do so. See *Provincial Ins. Co.* v. *Leduc*, 6 P. C. 224, 243. This theory, which removes from the insured the burden of proving a waiver, has been ably supported. See J. S. Ewart, "Waiver in Insurance Cases," 18 HARV. L. REV. 364. Its application to a case where the breach of condition occurred, or was first known to the insurer, after the loss, and where there was no possible prejudice to the plaintiff in the defendant's failure to act, is not only novel but against authority." [2]

J. S. Ewart begs leave to offer three submissions: First, election is not a theory but a fact. The erection of a house by a contractor is not properly denominated a theory. Its legal elements are (1) a contract, and (2) something done in pursuance of the contract. In election, there are the same elements — (1) by a contract (say a policy), one party is given a right, under certain circumstances, to elect between continuing and canceling it, and (2) in pursuance of the contract, the right of election is exercised.

The second submission is, that the application of election to every case in which a contract provides for its exercise may possibly be not only novel but against all authority (although I do not think it is), but it is indisputably right.

And the third submission is, that waiver can have no application to such cases.

The policy in the South Carolina case provided that it should be void

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[1] Scott *v.* Liverpool, etc. Ins. Co., 86 S. E. 484.

[2] 29 HARV. L. REV. 458, 9.

"if the subject of insurance be a building on ground not owned by the insured in fee simple."

"If this policy shall become void . . . the premium having been actually paid, the unearned portion shall be returned on surrender of this policy . . . this company retaining the customary short rate."

After holding that the insured was not the owner in fee simple of the ground, the court said:

"The insurance was effected in June; the fire occurred in August; the company had notice in a week thereafter. It discovered the defect in title. It kept the premium and keeps it now. . . . It has not followed the letter of the policy, but has waived the letter, and the policy stands with the forfeiture clause eliminated by the choice of that party who made it."

The court recognized (and the REVIEW commentator agrees) that, by proper construction, the policy was not void *ab initio* — that it would become void only at the election of the company. No one doubts that; and the whole trouble in such cases arises from the fact that, while everybody concurs in that view, very few carry it into their reasoning.

We are agreed then that the policy, by construction, provided that if the ground was

"not owned by the insured in fee simple, the company should have a right to elect between continuing and avoiding the policy."

If we stick to that, we shall have no trouble. Observe the following:

1. The clause ought not to be spoken of as a "forfeiture" clause. If a contract of sale of real estate contain a provision enabling the vendor to elect to rescind in the event of difficulties arising as to title, nobody would call it a "forfeiture clause." The provision in the policy is precisely the same as familiar provisions in these and many other contracts, namely, one containing an election to rescind.

2. It is wrong to say, as in the South Carolina case, that the company

"has not followed the letter of the policy, but has waived the letter, and the policy stands with the forfeiture clause eliminated . . ."

for such language is based upon the erroneous idea that the lack of title worked a "forfeiture" of the policy. It did not. It gave

the company a right to elect. If the company elected to terminate the policy, it would be following, not waiving, the letter of the policy. And so far from the clause being by election eliminated, it would remain as the only justification of the company's action.

3. Mistake arises from forgetting that nothing happens to a policy until the company elects to terminate it, and that when such election has been made, its validity is derived from the clause in the contract authorizing the election. The clause is not waived — it is acted upon.

4. There can be no "waiver," for there is no "forfeiture" to waive.

5. And so the question in all these cases is not one of "forfeiture" and "waiver of the forfeiture," but simply, whether or not the company has elected to rescind (sometimes to terminate) the policy.

6. But if this be true, what becomes of all those acts of the company which have been held to be "waivers of forfeitures" — acts which indicate intention on the part of the company to overlook deviations by the insured from specified conditions? Are they to have no effect? Do they give no rights to the assured?

The answer is, that not only are they important, but that, when properly applied, they are of greater service than when pleaded as "waivers." For example, in the South Carolina case, the court said that by retaining the unearned premium, the company had waived the forfeiture clause — had eliminated the clause from the contract. With submission, it would be better to say that the same fact — the retention of the money — was some evidence of an election to continue the contract. If the company had elected to rescind, it ought to have returned the money. If it had elected to continue, it would keep the money. It kept it. And that is some evidence of election to continue. All those customary acts of "waiver" are, or may be, evidence of election favorable to the insured.

7. Observe the effect upon the form of the pleadings by the substitution of election for "waiver." According to usual practice (elsewhere than in Indiana), the company pleads two things: (1) that the policy provided that, if the insured did so-and-so, the policy should be void, and (2) that the insured did so-and-so. But the plea is wrong. The policy ought to be pleaded accord-

ing to its real meaning, and in that case the plea must contain three allegations: (1) the policy provided that if the insured did so-and-so, the company should have the right to elect to rescind it, (2) the insured did so-and-so, and (3) thereupon the company elected to rescind. Without the third allegation, the plea would be manifestly bad, for, until such election, the policy remained unaffected.

8. According to present methods, the insured, instead of quarreling with the company's plea, assents to its sufficiency; agrees that the policy had been "forfeited" (without the right of election having been exercised); and replies that the company "waived the forfeiture." But that is wrong, for without an election by the company (which the company has not alleged), the policy has remained unaffected, nothing has happened, and there is nothing to "waive." The policy is canceled, if at all, by the act of the company — by the exercise of its election — and not by the act or omission of the insured.

9. If the company pleaded properly — made the three allegations — the issue which it would tender would be whether or not it had elected (as it alleges) to rescind the policy. And to that there could be no thought of replying "waiver of forfeiture." The plaintiff would join issue, and, upon the trial, all those circumstances which are now said to be "waivers of forfeiture" would be urged as evidence of election to continue the contract.

10. The effect upon the *onus* of proof is obvious. The assumptions at present being that the policy has become canceled ("forfeited") by the act of the insured (instead of, as in truth, by the election of the company), and that the only way that the insured can obtain judgment is by showing "waiver of forfeiture" by the company, the *onus* is upon him to prove (1) some act of "waiver," (2) by somebody who had authority for the company to "waive" — proof which the company, by the terms of its policy, has endeavored to make impossible. On the other hand, if the company must plead not only (1) the clause in the policy, and (2) the breach by the insured, but also (3) "that thereupon the company rescinded the policy," the *onus* is on the company to prove (1) election, (2) by someone authorized to elect.

11. And now, with reference to the view that the application of all this to

"a case where the breach of condition occurred, or was first known to the insurer, after the loss, and where there was no possible prejudice to the plaintiff in the defendant's failure to act, is not only novel but against authority."

Two cases are cited by the REVIEW commentator.[3] In neither of them is there any reference to election, but they may be referred to in elucidation of some of the foregoing points. They are cases in which the mere retention of unearned premiums (under circumstances somewhat similar to the South Carolina case) was held not to affect the right of the company to rely upon forfeiture caused by breach of some condition. In one of them, a California court said:

"Nor can the mere retention of the premium after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such a waiver or estoppel by the action or non-action of the insurer, after the loss, it is essential 'that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action.'"

That is certainly true as to estoppel. As to "waiver," I know very little — as will appear in a few minutes. But let us apply election. The clause providing for the company's right of election is not limited to a period prior to loss. Nothing in it suggests that the company's right to rescind terminates with the fire. Its right commences with knowledge of the fact giving the right to elect, and that, in the case in hand, was after the fire. And, observe, it is only by the exercise of the company's right to elect that it can escape payment. The policy furnishes no other ground of defence. There is no provision for "forfeiture" in it.

12. Moreover, if it be true that election has no application after the loss, neither has forfeiture or "waiver." For either the clause providing that the policy shall be void, etc., is, or is not, in force after the loss. If it is, it provides for election, and the right to elect therefore exists. And if it is not in force, then the only ground upon which forfeiture can be suggested has vanished.

13. Of "waiver," all I know (or, rather, believe) is that, apart from what the old books tell us about a pursued thief throwing

[3] Ætna Ins. Co. *v.* Mount, 90 Miss. 642, 44 So. 162; Goorberg *v.* Western Ass. Co., 150 Cal. 510, 89 Pac. 130.

away the stolen goods, every case of "waiver" may be put under one or other of four headings — Election, Estoppel, Contract, and Release. "Waiver" in insurance cases is sometimes estoppel, but almost always election. When you "waive" protest of a note, that is contract. When you "waive" a clause in a contract, that is either a new contract or estoppel. When you "waive" a right of action, that is release, or contract, or nothing at all.

14. The word "waiver" is as useful and as misleading as is "suction" in physics; and just as, apart from such other forces as atmospheric pressure, muscular action, flow of water, etc., there is no such force as suction, so there is not in law any such concept as "waiver," apart from the subjects above mentioned.

15. "Waiver" ought not to be confused with these other subjects. For, if it is anything at all, it is a purely unilateral act, its favorite definition being "an intentional relinquishment of a known right"; whereas effective legal action in the other classes of cases is always, at the least, bilateral. For example, relinquishment of a right to sue for a debt will not be effectual unless it amounts to a release, or is embodied in contract, for both of which the coöperation of another party is necessary. For the somewhat general confusion of "waiver" with estoppel there is no excuse. An example of it appears in the last of the above quotations, and the digest headings are "Waiver or Estoppel." But waiver, if anything, as has been said, is unilateral; whereas for estoppel there must be conduct by one party, acted upon by somebody else. Election is based upon contract. And contract is, of course, at the least, bilateral.

16. My article of some years ago (that to which the commentator referred) proceeded somewhat upon the same lines as the present. Since that time the Indiana courts have adopted the views there advocated. They hold that the company must plead not merely (1) the condition in the policy, and (2) breach by the insured, but also (3) "that thereupon the company elected to cancel the policy." In the judicial opinion in one of the cases my article was referred to in this way:

"The misuse of the word 'waiver' in this connection is clearly shown by a recent writer in an illustrative article: *Waiver in Insurance Cases* (Ewart), 18 HARV. L. REV. 365."[4]

[4] Modern Woodmen, etc. *v.* Vincent, 40 Ind. App. 711, 714, 80 N. E. 427, 429 (1907).

17. I have prepared for the press a dissertation with the title "Waiver distributed into Election, Estoppel, Contract, and Release," but four publishing firms have declined it. It is said to be "highly meritorious," and so on, but it is only 350 pages, and a small book is as bothersome as one yielding larger returns. The encyclopedias and the stenographers are rapidly depriving lawyers of any claim to be members of one of the learned professions.

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